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TEAMSTERS LOCAL 601

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Teamsters Local 601, Charging Party, v. Constellation Brads, U.S. Operations, Inc. d/b/a Woodbridge Winery, Respondent.	Case No. 32-CA- 186238; 32-CA-186265 **CHARGING PARTY'S POST-HEARING BRIEF** Hearing Dates: May 3rd and 4th, 2017 Judge: Hon. Ariel L. Sotolongo

I. STATEMENT OF THE CASE

On May 3rd and 4th, 2017, a hearing was held in Oakland, California, before Administrative Law Judge Ariel L. Sotolongo on a Consolidated Complaint issued by the Regional Director for Region 32 on January 31, 2017. The Complaint alleges that Constellation Brands (hereinafter "Respondent" or "Constellation") violated section 8(a)(1) of the National Labor Relations Act (hereinafter, "NLRA" or "Act") by maintaining unlawful handbook rules and by telling an employee, Manuel Chavez (hereinafter, "Chavez") that he could not display the message "Cellar Lives Matter" on his safety vest while working in the Respondent's facility and ordering the employee to remove the vest.

As will be shown, the three handbook rules identified by the Region unlawfully interfere with, restrain and coerce employees in their exercise of Section 7 activity. Additionally, the Respondent's

appropriate Remedy and Order should be issued to halt such violations of the Act and rectify the violations of the law.

II. STATEMENT OF FACTS

A. Background

Respondent is a large wine producer and distributor. The Woodbridge Winery facility is a huge facility in Lodi, California, at which the employer produces large quantities of wine. On September 2, 2014, Teamsters Local 601 (hereinafter "the Union") filed a representation petition for the Respondent's Outside Cellar Department. (Tr. 36-37.) The election was held in February 2015. (Tr. 8.) Since the election, the Respondent has refused to recognize the Union and has challenged the certification. (Tr. 39.)

Chavez has worked for the Respondent for six years. (Tr. 30.) Chavez is a senior cellar operator. (*Id.*) Chavez is a known union activist and union steward. (Tr. 36:2-39:13.)

B. Respondent's Prohibition of Safety Vest with Pro-Union Messaging

On July 20, 2016, Chavez wrote the words "Cellar Lives Matter" on his vest before going to work. (Tr. 52; GC Exh. 2.) The vest was a high visibility safety vest that Chavez and other Outside Cellar employees must wear while working. (Tr. 46-47.) On July 19, 2016, Chavez and his coworkers discussed creating their own pro-union apparel. (Tr. 68.) The employees wanted to create their own shirts to protest the Respondent's refusal to recognize the union election results and certification, and the employees' bargaining rights. (Tr. 68-69.) Chavez wrote "Cellar Lives Matter" on his vest because he wanted to wear a shirt with pro-union messaging "right away" and did not have time to have shirts with pro-union messaging made before work the next day. (Tr. 69.) Previously, another employee was permitted to wear a safety vest with an anti-union message written on it,[1] so Chavez believed it was permissible to write a pro-union slogan on his vest. (Tr. 69.)

[1] Specifically, in the period preceding the 2015 union election, Respondent permitted an employee, Frankie Castillo, to wear a safety vest upon which he had written "Vote No", obvious anti-union messaging. (Tr. 49, 79-80.)

From July 20, 2016, to August 4, 2016, Chavez wore a safety vest upon which he had written "Cellar Lives Matter." (Tr. 50-51.) Employees told Chavez that they liked the slogan and that they liked his vest. (Tr. 69-70, 72.) No employee told Chavez that his vest or its messaging was offensive. (Tr. 72.)

Management eventually told Chavez to remove his vest. (Tr. 73.) On August 4, 2016, Josh Schulze, the General Manager of the Woodbridge Winery facility, and Angela Schultz, a Human Resources Representative, called Chavez into a meeting. (Tr. 74-76.) Schulz informed Chavez that he was not permitted to wear a safety vest upon which he had written "Cellar Lives Matter." (*Id.*) Schulze ordered Chavez to remove the vest. (Tr. 74-75.) After the meeting with Schulze and Schultz, Chavez did not wear the vest again. (Tr. 77.)

While Schultz and Schulze claimed the vest was offensive, both admitted that not a single employee complained about the vest to management or said at any time that the vest was offensive. (Tr. 214.) Schulze also admitted that Chavez did not violate any defacement policy by writing on the vest as no such Company policy exists. (Tr. 228-229.) Additionally, two days before Chavez began wearing his Cellar Lives Matter vest, Respondent had distributed a t-shirt with messaging that referenced a rap group N.W.A., arguably most famous for a protest song in which violent fantasies of retaliation against law enforcement are described.[2] (G.C. Exh. 3(b); Tr. 232-236.)

C. Respondent's Maintenance of Employee Handbook Containing Unlawful Rules

The Respondent maintains an Employee Handbook containing policies rules applicable in facilities nationwide. (Jt. Exh. 5.) Handbook was issued to current employees and is issued to new employees, and applies to all employees working in the Constellation Brands Woodbridge Winery facility, including the bargaining unit represented by the Charging Party. The Handbook is

[2] "N.W.A." stands for "Niggaz Wit Attitudes." A link to the video for *Fuck the Police* can be found here: https://www.youtube.com/watch?v=Z7-TTWgiYL4.

distributed to employees of Respondent nationwide. (Tr. 209; Jt. Exh. 5 at p.5.[3]) The Handbook was last revised in January 2016. (Jt. Exh. 5.)

III. LEGAL ARGUMENT

A. The Respondent Violated The Act When Schulze Directed Chavez To Remove His "Cellar Lives Matter" Vest.

Employees generally have a protected right under Section 7 to wear union insignia, in the workplace, absent a showing of "special circumstances." (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945); *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007).) These protections of Section 7 expression have always extended to articles of clothing, including pro-union T-shirts. (See, e.g., *Wal-Mart Stores*, 340 NLRB 637, 638-639 (2003), enfd. in relevant part 400 F.3d 1093 (8th Cir. 2005); *Aldworth Co.*, 338 NLRB 137, 203 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB,* 363 F.3d 437 (D.C. Cir. 2004); *Broadway*, 267 NLRB 385, 404 (1983); *United Parcel Service*, 195 NLRB 441, 448 fn. 24 (1972); *De Vilbiss Co.*, 102 NLRB 1317, 1321 (1953).) There is no basis in Board precedent for treating clothes displaying protected messaging, like union insignia, as categorically different from other union insignia, such as buttons. (See, e.g., *Great Plains Coca-Cola Bottling Co.*, 311 NLRB No. 56 at 515 (1993) ("The Board treats article[s] of clothing the same as a button.").)

This right to wear pro-union insignia may give way when the employer demonstrates special circumstances sufficient to outweigh employees' Section 7 interests and legitimize the regulation of such insignia. (See *Komatsu America Corp.*, 342 NLRB No. 62 at 650 (2004).) Special circumstances may include, among other things, "situations where display of union insignia might 'jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.'" (*P.S.K. Supermarkets*, 349 NLRB No. 6 at

[3] The Handbook states, "ABOUT THIS HANDBOOK: The following applies to all U.S. employees working at Constellation Brands, Inc., and its subsidiaries and affiliates[...]" (Jt. Exh. 5 at p. 5.)

35 (2007) (quoting *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. 99 Fed. Appx. 233 (D.C. Cir. 2004)).) The burden is on the Respondent to prove the existence of special circumstances that would justify a restriction. (See *W San Diego*, 348 NLRB 372, 372 (2006).) Here, Respondent permitted another employee to wear a safety vest with antiunion messaging for several weeks during the organizing campaign and at no time directed him to remove it, so any argument that special circumstances apply to prohibit the expression of pro-union messages is specious.

The Respondent failed to show any special circumstances justifying the prohibition on Chavez' protected conduct. Schultz admitted there was no issue with racial discontent at the Woodbridge facility. (Tr. 305.) Indeed, there was no evidence that the vest disrupted the work environment in any way. All Respondent's witnesses admitted there had been no complaints from any employees, and that the managers had concluded, apropos of nothing, that the vest was a problem.

The patent hypocrisy of Respondent's claim that "Cellar Lives Matter" was offensive messaging given that the Respondent itself had produced and distributed shirts emblazoned with the message "Straight Outta Woodbridge" reveals that the true intent was to restrict Chavez' speech because of its pro-union message. The inspiration for Chavez' message was Black Lives Matter, an activist movement that campaigns against systematic racism and violence, including police violence. Chavez chose the phrase because it was catchy and popular, recognizable for any observer of contemporary political news. Similarly, Respondent chose the phrase "Straight Outta Woodbridge" in reference to a recognizable and popular phrase, "Straight Outta Compton," the album by N.W.A. and the movie of the same name. The group N.W.A. is most famous for its song "Fuck the Police," which protests police violence against African Americans. The fact that these messages are rooted in similar political sentiments, and the "Straight Outta Woodbridge" message sponsored by the Respondent draws on a subject for its meaning that is at least as, and if not more, controversial in

terms of its support for violence *against* police, underscores the disingenuousness of any claim that Chavez' vest was "offensive." Schulze's reliance on the public backlash after a political candidate stated "All Lives Matter," and other uses of similar phrasing such as "Black Lab Lives Matter" and "Unborn Lives Matter" is wholly misplaced and does not support the conclusion that "Cellar Lives Matter" is inappropriate. "All Lives Matter" was criticized because it was in direct response to and commenting on the Black Lives Matter movement in a manner that many felt dismissed the animating principle and central concern of the movement.[4] Dissimilarly, Chavez used a well-known slogan to draw attention to Respondent's ongoing labor violations at the Woodbridge Winery, clearly drawing on the symbolism of BLM's protest to make a point about the unfair and unlawful treatment of the Outside Cellar Department employees.

In any case, even if there were proof that the vest had actually offended anyone, it would be wholly irrelevant to the issue of protected speech. Indeed, it is likely that union supporters were "offended" by Castillo's "VOTE NO" vest, but the Respondent did nothing to prevent such speech. Clearly, the Respondent imposed a content-based restriction on the wearing of decorated safety vests, with the content restriction being that which addressed injustices at the Woodbridge facility and was thus activity protected by Section 7.

Additionally, the fact that Josh Schulz, the General Manager and highest ranking official at the Woodbridge Winery, banned Chavez from wearing his vest makes the discriminatory treatment especially coercive. The Board has repeatedly emphasized that "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." (*Michael's Painting, Inc.* 337 NLRB 860, 861 (2002), enfd. 85 Fed. Appx.

[4] One could also say that "Black Lab Lives Matter" and "Unborn Lives Matter" similarly trivialize the Black Lives Matter messaging, but others could employ such phrases to seriously protest the devaluation of black labs and of fetuses. This is the inherent nature of much constitutionally protected speech: meaning is contested because one's experience and identity inherently impacts one's view of an issue. Perception of an issue or struggle, including Black Lives Matter, varies greatly based on countless variables, which can include and certainly are not limited to identity, class, experience and position.

614 (9th Cir. 2004); see also *Aldworth Co.*, 338 NLRB 137, 149 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004) (captive audience meetings convey a particularly significant impact when conducted by high-level officials).)

B. The Respondent Maintains Several Unlawfully Overbroad Work Rules.

As set forth below, Respondent's Employee Handbook contains at least three clearly unlawful provisions, under well-established Board law. These include the broad prohibition on "secret recording" and all photographs or recording within certain areas, the Company Short-Term Incentive (Bonus) Plan which explicitly excludes unionized employees and the social media policy's requirement that employees use disclaimers when posting content about or relating to the Respondent on social media.

1. Applicable Legal Standard

Maintaining and/or implementing work rules that "would reasonably tend to chill employees in the exercise of their Section 7 rights" violates Section 8(a)(1) of the Act. (*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem., 203 F.3d 52 (D.C. Cir. 1999).) Such rules are unlawful even if the employer has never actually enforced the rule. (*Mercedes-Benz U.S. International, Inc.*, 361 NLRB No. 120 (2014) ("a rule does not have to be enforced to be unlawful").) Ambiguous employer rules (i.e., rules that reasonably could be interpreted as having a coercive meaning) are construed against the employer. (*Flex Frac Logistics, LLC*, 358 NLRB No. 127 slip op. at 2 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).) The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. (*Lutheran Heritage*, 343 NLRB No. 75 at 647 (2004); *Lafayette Park Hotel*, supra at 828; *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007).)

In *Lutheran Heritage Village-Livonia, supra*, the Board established a framework for determining whether a work rule unlawfully restricts or chills Section 7 rights. Under this framework, rules that explicitly restrict Section 7 rights are unlawful. (*Id.*) Additionally, rules that

do not explicitly restrict Section 7 rights may nevertheless violate Section 8(a)(1) if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." (*Id.*; see also, *Hyundai America Shipping Agency*, 357 NLRB 860, 861 (2011); *Flex Frac Logistics, LLC,* supra at 1146 (2012).)

2. Use of Recording Devices Policy

The Use of Recording Devices Policy can be reasonably construed by employees to chill the exercise of Section 7 rights. The Policy reads as follows:

> We value open and honest communication. To support this value and respect the interests of employees, *the Company prohibits the secret use of recording devices at all times*. Out of respect for others, employees are requested to use sensitivity and good judgment if using recording devices, cameras or camera phones in the workplace. Use of cameras or camera phones in restrooms, locker rooms and changing rooms is strictly prohibited. In addition, employee use of recording devices, cameras or camera phones to record or photograph Company trade secrets or confidential business information (as defined in the Use of Social Media Policy herein), other than for a legitimate Company business purpose is strictly prohibited." (Jt. Exh. 5 at p. 14 (emphasis added).)

Photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. (*Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015).)

The Board has recognized in recent decisions that secretly recording in the workplace can be protected conduct. Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. (*Id.*) The Board recognized that its case law is

replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right. (*Whole Foods Mkt., Inc.*, 363 NLRB No. 87, 3 fn. 8 (2015) (citing numerous decisions)[5] affirmed, 2017 WL 2374843 (Mem) (2nd Cir. 2017); see also, *T-Mobile USA, Inc.*, 363 NLRB No. 171 (Apr. 29, 2016) (prohibition on all sound recordings of work-related or workplace discussions unlawful because it did not differentiate between recordings that are protected by Section 7 and those that are not).) The absolute prohibition on recording in restrooms, locker rooms and changing rooms is also overbroad, and could be interpreted by employees as chilling the exercise of Section 7 rights in some circumstances.

In a recent case, a work rule prohibiting "all musical devices to include but not limited to cell phones and head/ear phone use within the warehouse" was found unlawful. (*Shamrock Foods Company and Bakery*, JD-(SF)-18-17, 2017 WL 1488999 (Apr. 25, 2017) (citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015)).) The judge observed that a rule prohibiting "musical devices" (i.e., devices which play music) would not be overly broad and therefore lawful; however, the extension of the rule to prohibit use of a cellphone on the workroom floor was overbroad and unlawful. This was due, in part, to the fact that the company had provided a business justification for not allowing musical devices in the warehouse, but had provided no justification for the broad extension of the rule to include cell phones. In support of the holding the judge noted, "cell phones are used for more than listening to music--they are also commonly used as cameras and recording devices." (*Id.*) Thus, the "broadly worded instruction [...] would reasonably be construed as prohibiting him from using his cell phone to memorialize activity protected by Section 7." (*Id.*) This decision underscores the invalidity of the broad prohibition on recording at issue in this case, which specifically prohibits *all* secret recording, regardless of whether the recording is in relation to employees' exercise of Section 7 rights. (See *Rio*, 362 NLRB No. 190, slip op. at 4.)

[5] Notably, in *Whole Foods*, the majority rejected the argument that language in the rule explaining its purpose was to promote "open communication"--identical to Respondent's language in its policy--did not cure the rule's overbreadth. (363 NLRB No. 87 at *4.)

3. Company Short-Term Incentive (Bonus) Plan

The Employer's Short-Term Incentive (Bonus) Plan policy states the following: "ELIGIBILITY: All non-union, regular full-time and regular part-time employees of the Company are eligible for the incentive plan." (Jt. Exh. 5 at p. 27.)

It is settled that it is a violation of Section 8(a)(1) for an employer to tell employees that they will be losing a benefit because their status as union represented makes them ineligible for the benefit. (*Goya Foods of Florida*, 347 NLRB 1118, 1131 (2006) (unlawful comments that employees would be unable to participate in the company's pension plan if they were union members); *VOCA Corp.*, 329 NLRB 591 (1999) (employer violates Section 8(a)(1) by announcing corporate bonus program that automatically excludes union-represented employees); *Niagara Wires, Inc.*, 240 NLRB 1326, 1327 (1979) (it is a per se violation of Section 8(a)(1) for employer to maintain pension plan that by its terms excludes from coverage employees who are "subject to the terms of a collective bargaining agreement").) Thus, the explicit exclusion of unionized employees from the short-term incentive bonus plan is facially unlawful.

4. Social Media Policy

The Handbook contains an unlawful restriction on employee communication with third parties. Specifically, the social media policy states that employees must use disclaimers when "contributing content about or relating to the Company" on social media. (Jt. Exh. 5 at p. 13.) The social media policy also contains an overbroad prohibition on testimonials about the Respondent: "Testimonials or endorsements about the Company or its products should be avoided." (*Id.*)

Similar requirements and/or restrictions violate Section 8(a)(1) as improperly tending to chill or infringe on the exercise of Section 7 rights. For example, the Division of Advice has opined that similar restrictions are unlawful burdens on Section 7 activity. In one such case, an employer's requirement that employees include a disclaimer if they identify themselves as an employee of the employer on social media to be unlawful because "it places an undue burden on employees' Section 7

rights." (*24 Hour Fitness*, 44 NLRB AMR 22 (Oct. 7, 2015) (citing *Kroger Co.*, Case 07-CA-098566, JD-21-14, at 9-12 (NLRB Div. of Judges Apr. 22, 2014) (concluding that similar requirement was unlawful); *Zenith-American Solutions*, Case 05-CA-137182, Advice Memorandum at 12-13 (Apr. 27, 2015) (same)).) Similarly, in *Casino Pauma*, an administrative law judge found a prohibition on posting references to and pictures of the casino or coworkers on social media unless accompanied by an employer-approved disclaimer was found to be unlawful. (21-CA-161832 (July 18, 2016).)

As with these decision, here the Respondent maintains a rule requiring employees to use a disclaimer when posting on social media about Respondent, which is clearly an undue burden on Section 7 activity and therefore unlawful.

5. Remedy

In cases involving unlawful restraint of pro-union messaging and insignia, the remedy is generally to cease and desist the unlawful practice and to take affirmative remedial steps. In light of the Respondent's flagrant violations of the law in these consolidated cases, it is the Union's position that such affirmative remedial action should include requiring the Respondent to not only post a notice on all employee bulletin boards, in employee breakrooms and at Taco Bell, but also to disseminate such notice by requiring a reading of the Notice aloud to all employees throughout the facility in the presence of a Union-designated represented and the discriminatee, Manual Chavez.

In cases involving unlawful handbook rules, the remedy is typically to require a notice posting and an order that the employer rescind or revise its unlawful rules. Here, the remedy should require Respondent to post physical notices to employees at its facilities nationwide and electronic notices via its internal intranet, in which employees are assured of their Section 7 rights and in which the Respondent promises to cease and desist from its unlawful conduct, and any other remedy deemed appropriate. In similar cases, a posting at all affected facilities has been ordered. Additionally, the

Respondent should be required to revise its Employee Handbook to eliminate its unlawful provisions and provide this revised version to all employees.

A nationwide remedy is appropriate and should be ordered. The General Counsel presented uncontroverted evidence that the Employee Handbook is used nationwide. Additionally, the Handbook itself states that it "applies to all U.S. employees working at Constellation Brands, Inc. and its subsidiaries and affiliates..." (Jt. Exh. 5.) Because the Handbook has been issued nationwide and its rules apply nationwide, employees at Constellation facilities across the United States have suffered the same violation as the employees at the Woodbridge facility. Therefore, any remedy issued at the Woodbridge facility should be ordered nation-wide.

IV. CONCLUSION

The General Counsel has established that Respondent violated the Act as alleged, and all appropriate relief should be granted. The Union requests that the ALJ order affirmative remedial action that will adequately repudiate the Employer's wrongful conduct.

Dated: June 8, 2017

BEESON, TAYER & BODINE, APC

By: _____
ROBERT BONSALL
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I declare that I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 520 Capitol Mall, Suite 300, Sacramento, CA 95814-4714. On this day, I served the foregoing d cument(s):

CHARGING PARTY'S POST-HEARING BRIEF
[Case Nos. 32-CA-186238 and 32-CA-186265]

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Sacramento, California.

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☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Kenneth H. Ko, Esq.
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I declare under penalty of perjury that the foregoing is true and correct. Executed in Sacramento, California, on this date, June 8, 2017.

Cynthia Belcher
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